

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 368 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and  
MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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RAVIGIRI KAMALGIRI BAWAJI

Versus

STATE OF GUJARAT

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Appearance:

MR JV DESAI for Petitioner  
Mr.S.R.Devita, L.APP for Respondent No. 1

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CORAM : MR.JUSTICE N.J.PANDYA and  
MR.JUSTICE S.D.PANDIT

Date of decision: 23/04/97

ORAL JUDGEMENT

In all three accused with one Juvenile were facing charge of murder. The case of the Juvenile was transferred to the concerned forum and the remaining 3 were chargesheeted before the learned Sessions Judge, Junagadh. Earlier, charge came to be framed against 3 of

them and later on, it came to be amended, as one of the accused Kanaiyalal Nagardas died during the pendency of Sessions Case No.28 of 1988. Fresh charge, therefore, came to be framed at Exh.10 against the remaining 2 accused.

2. It was the prosecution case that on 11-11-1987 i.e. night of 10-11-1987 at about 12.30 in Haveli Gali of Junagadh City the incident happened. Kirenkumar, since deceased, along with his two companions, was returning from a religious discourse referred to as "Bhagat Sata". As he was passing through the said lane, 4 assailants came there and two of them had knives in their hands. The target of attack was the said Kirenkumar. He was given knife blows, one of which proved fatal and in injured condition he was removed to the hospital and during treatment he died. About the death being homicidal, there is no dispute at all.

3. The question before the trial Court and before us was, whether either of the remaining two accused have committed crime and if yes, what crime have they committed.

4. For this purpose, it being night time, the question of identity of the assailants has to be established by the prosecution. As only one of the two remaining accused has been convicted by the learned trial Judge by his Judgment dated 29-5-1989 for offence under Sec.302 read with Sec.34, the aforesaid two questions in the appeal will have to be considered with reference to the accused-appellant. Needless to say, accused no.1 before the trial Court was acquitted.

5. The prosecution is relying on the dying declaratin of the deceased recorded on 11-11-1987 at 3.30 AM proved through the Executive Magistrate Shri Makwana Exh.14 page 31 of the paper book. The other material for the purpose relied on is the deposition of Rajesh Kanaiyalal Mehta, p.w.4 Exh.24 page 65 of the paper book. He is an eye witness and the complainant as well. The second witness is his companion Mr.Joshi who, too, has been examined and he is p.w.9. Exh.39 page 107.

6. Coming to the depsoition of the complainant and eye witness Rajesh K.Mehta first, in examination in chief para 2, at Exh.24, page 75, he has categorically stated that from two of the assailants who had knives in their hands, he identified one as he knew him and the name of that person is Ravi Bawaji, that is how, according to the prosecution, the accused appellant is known. The witness

has been thoroughly cross examined and so far as his assertion of knowing the appellant is concerned, searching questions have been put to him in para 18 page 73 & 74 of the paper book. The attempt is to show that Bawaji, the appellant is not working in the hotel of Kanu Nathwani. This question has been put because the assailants were said to be belonging to the group of Kanu Nathwani with whom the deceased about 2 to 3 months prior to the incident had some quarrel. That quarrel is said to be the cause for the present incident. The witness Rajesh Mehta, Exh.24, in the aforesaid cross examination could only be made to say that he did not know whether the present-appellant was actually working in the hotel of Kanu Nathwani. He asserts in the cross examination itself that he had seen the appellant sitting in the said Hotel though he is unable to say for what length of time he had seen the appellant so sitting and since when has he seen him so sitting. The suggestion put to him that he did not know Ravi Bawaji, the appellant, has been denied by him.

7. The complaint given by this witness is at Exh.46 page 124. The said witness Rajesh Mehta, in his complaint, has named the present accused-appellant and in the body of the complaint also, he has named him in no uncertain terms. The complaint has been given within a couple of hours of the incident.

8. The dying declaration is also clear about involvement of the accused-appellant and looking to this material, if it is concluded that the case against the accused is made out, in our opinion, no infirmity can be said to be existing in the prosecution case.

9. The said Executive Magistrate, at the request of the Investigating Officer, had undertaken the exercise of test identification parade. The said two witnesses Mehta and Joshi were the witnesses to identify the suspect and in the course thereof, they had identified two of them and one happened to be the present appellant.

10. At the same time, it must be noted that in the deposition of the said two witnesses, the prosecution has not put any question with regard to the test identification parade and its result. One would have expected the Public Prosecutor, who conducted the matter before the trial Court to bring this fact in the course of their deposition and thereby complete the chain of evidence as to identification parade, so that the prosecution can rely on it. Barring this lacune, so far as the case against the appellant is concerned, in our

opinion, it has been made out and for that purpose, in our opinion, even if the said test identification parade held with the help of these 2 witnesses is left out of consideration, there would not be any change in the said conclusion.

11. L.A. Mr.Desai appearing for the accused-appellant had two other submissions to make. One was that the case can at best be covered by Sec.326 of the Indian Penal Code and not by 302. This argument is mentioned for the purpose of being rejected. The second submission was that none of the witnesses has stated as to which blow was given by which of the accused, nor is said that fatal blow was given by any of them. Muchless, therefore, according to Mr.Desai could it be said that the present appellant was responsible for the vital blow. However, it may be recalled that aid of Sec.34 has been taken right from the beginning. When evidence was not found sufficient against the remaining accused, original accused no.1, the learned trial Judge had, let him off. But so far as the present accused-appellant is concerned, when Sec.34 is already pressed into service by the prosecution from the beginning and when both eye witnesses assert that the accused-appellant had wielded his knife and had given blows with it to the deceased coupled with the said dying declaration of the deceased clearly stating that the present appellant had given vital blows, in our opinion, the conviction with the aid of Sec.34 has to be sustained.

12. The net result is that the appeal fails and is dismissed.

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